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NOTE AND COMMENT.

THE CONSTITUTIONALITY OF THE WEBB-KENYON ACT.—In the constitutional history of the commerce clause, by virtue of which absolute control of interstate commerce was given to the Federal Government, there is no question which has caused so much difficulty and has resulted in so many unsatisfactory and contradictory statements of the law as that problem arising through the attempts of many States effectively to enforce prohibition laws. The power over interstate commerce, delegated to the Federal Government, and the police power, reserved to the States, have not seriously conflicted except in this one instance. But the delegation of power to the Federal Government has been so construed as to render the prohibition laws of States practically ineffective by denying to those States the power to prevent the importation of liquor from other States.

This condition of affairs, the inability of a State to effectuate its domestic, social and economic policies, became so deplorable that at last Congress was obliged to legislate to render effective these police measures of the States. The recent act of Congress, the WEBB-KENYON ACT of March 1, 1913 (37 Stat. at L. 699), was passed with the purpose of giving, to those States where

prohibition exists or may exist, control over intoxicating liquors the moment they reach the borders of those States.

In *State* v. *Grier* (Del.), 88 Atl. 579; *State* v. *Van Winkle* (Del.), 88 Atl. 807; *State* v. *United States Express Co.* (Iowa), 145 N. W. 451, and *United States* v. *Ore. Wash. Ry. & Nav. Co.*, 210 Fed. 378, the constitutionality of the WEBB-KENYON ACT was sustained. To this act the two objections were that: first, Congress has no power to declare that interstate commerce interests are subordinate to, and should give way when they come in conflict with, State police interests; and second, Congress can not delegate to the States the power to regulate commerce. It is interesting to note that these objections were the very objections upon which President TAFT'S veto was based and over which the act was passed.

The first cases of historical importance relating to this subject are known as the *License Cases*, 5 How. 504, 12 L. Ed. 256, decided in 1847. And the doctrine was laid down by CATRON, J., that until Congress had regulated commerce the States could exercise the power of regulation, non-action on the part of Congress presuming consent to the State regulations. Such a doctrine one would expect to emanate from a court, the majority of whose members were ardent State-rights men.

But these cases were subsequently overruled by *Bowman* v. *Chic., etc., Ry Co.*, 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689, and *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681, which cases held that the power of Congress in the field of interstate commerce is exclusive, and that consent to State regulations cannot be presumed from mere non-action on the part of Congress. In *Leisy* v. *Hardin* it was said that in the absence of enabling legislation by Congress the State did not have the power to prohibit the transportation of liquors into the State, the power of the State only attaching when the liquor became commingled with the general mass of property in the State.

Acting upon the dictum in *Leisy* v. *Hardin*, Congress enacted the WILSON ACT of Aug. 8, 1890 (26 Stat. at L. 313), the purpose of which act was to render possible the full exercise of the police power of the State by taking away the interstate commerce character of spirituous liquors "upon their arrival" in the State. This act was declared constitutional in *Re Rahrer*, 140 U. S. 545, 35 L. Ed. 572, 11 Sup. Ct. 865. In view of the preceding cases and the wording of the act it seems as if Congress had meant to give the State control when the liquors reached the borders. But the WILSON ACT was rendered practically useless by the holding in *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. 664, which declared that the word "arrival" meant actual delivery to the consignee, and that the power of the State did not attach till then. A very pointed illustration of the evils of *Rhodes* v. *Iowa* is furnished by the case of *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189, in which case it was held that an injunction would issue to compel a carrier to transport liquor into "dry" territory.

It is manifest that so long as the law remained as expressed in *Rhodes* v. *Iowa* and *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, no State could

enact legislation which would insure absolute prohibition within that State. So by passing the WEBB-KENYON ACT—provided such legislation is constitutional—Congress has at last made it possible for a State to enact a prohibition law which will absolutely prohibit.

With reference to the objection that the WEBB-KENYON ACT is an invalid delegation by Congress to the States of power over interstate commerce, *Cooley* v. *Bd. of Port Wardens,* 12 How. 299, 13 L. Ed. 299; *Hanover Bank* v. *Moyses,* 186 U. S. 181, 46 L. Ed. 1120, 22 Sup. Ct. 861; and *In re Rahrer* should be carefully considered.

In *Cooley* v. *Bd. of Port Wardens,* the constitutionality of the Act of Congress of August 7, 1789, was questioned. This act gave the States power to enact pilot laws, and such laws were considered by the majority of the court to be regulations of commerce. Yet the Supreme Court declared this act valid, recognizing that the subject of such legislation may be best provided for by many different systems enacted by the States. The court said, "Either absolutely to affirm, or deny that the nature of this power requires exclusive regulation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive regulation by Congress. That this can not be affirmed of laws for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

The importance of *Cooley* v. *Bd. of Port Wardens* is that it recognized that commerce may be local or national in its nature, and as to that local in nature it is desirable that the States legislate. But if this be true Congress simply adopted State regulations which were valid. Is not the true situation that Congress has the responsibility of commerce upon it, and by the Act of 1789 has refused to assume the burden?

In *Hanover Bank* v. *Moyses* the Bankruptcy Act of 1898 was questioned as being unconstitutional because, it was claimed, the recognition of exemptions by local laws amounted to a delegation of authority. But the court said, "Nor can we perceive in the recognition of the local law in the matter of exemptions, dower, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power."

In Re Rahrer sustained the WILSON ACT in face of the same objection raised to the WEBB-KENYON ACT. The court said, "But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In

so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property. * * *

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." So the decision in the case is that Congress acts not upon the States but upon things, so that what was interstate commerce prior to the legislation of Congress has ceased in part to be such after that legislation.

Of those cases upholding the WEBB-KENYON ACT *State* v. *United States Express Co.* clearly points out how Congress acts upon things in the following words, "It is true that the effect of the act is to give the States more power, but there is no such express delegation, and the language of the act is in no sense permissive. The act is prohibitory in character, and acts not upon States, but upon articles of commerce. Interstate commerce in these things is prohibited under certain conditions, and, as we shall presently see, the act is uniform in its operation."

The doctrine that in such legislation Congress acts upon things rather than upon the States has hardly been followed to any great extent even by the Supreme Court of the United States. *Indianapolis* v. *Bieler,* 138 Ind. 30, speaks of such acts as subjecting interstate commerce to the power of the States; *State* v. *Hanaphy,* 117 Iowa 15, 90 N. W. 601, as giving power to the States; *Pabst Brewing Co.* v. *Crenshaw,* 198 U. S. 17, 49 L. Ed. 925, as conferring power upon the States; *Ex parte Jervey,* 66 Fed. 957, as the permission of Congress; *In re Bergen,* 115 Fed. 339, as the consent of Congress; *People* v. *Hesterberg,* 184 N. Y. 126, as authority from Congress; *Delamater* v. *S. Dak.,* 205 U. S. 93, 51 L. Ed. 724, as allowing or enabling the States to act.

That Congress has no discretion to declare that interstate commerce interests must give way to police interests when the two powers come in conflict does not seem to be socially and politically sound. It does not seem as if those who made the Constitution ever intended that the commerce clause should establish the supremacy of interstate commerce interests when in conflict with the police power, irrespective of the importance of the two interests. A great deal of confusion is no doubt due to the failure to distinguish between those interests which are commercial, and those which are social and moral, affecting commerce only incidentally.

If this objection were tenable how could we justify the innumerable cases where police measures were sustained although commerce was affected indirectly and incidentally? As examples of such legislation are State regulations of interstate trains, requiring such trains to stop at populous centers. *Lake Shore, etc., Ry. Co.* v. *Ohio,* 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465; State inspection laws, *Turner* v. *Md.,* 107 U. S. 38, 27 L. Ed. 370, 2 Sup.

Ct. 44; and *State* quarantine laws, *R. R. Co.* v. *Huson,* 95 U. S. 465, 24 L. Ed. 527.

In view of the decisions of the Supreme Court relative to the WILSON ACT it does not seem as if there should be much doubt as to the constitutionality of the WEBB-KENYON ACT. That this Act is not likely to be declared invalid is apparent from the broader and more reasonable view the Supreme Court has been taking of the police power of the States. One cannot but realize this change of attitude by the court after reading *Silz* v. *Hesterberg,* 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. 10. The New York laws prohibited the having in possession certain game birds during the closed season. The relator, an importer, was prosecuted for unlawfully having in his possession certain game birds, these birds coming from Russia. This law was held to be a valid exercise of the police power of the State, as the State could not effectively enforce its game laws protecting domestic birds unless it could prohibit the having in possession of such birds although imported. In connection with this case, the question arises whether or not, according to this decision, a State might not prohibit the importation of liquor provided it has already prohibited the use, sale, and manufacture of the same within the State. G. E. K.

THE STATUTE OF FRAUDS AND INDEMNITY CONTRACTS.—There are few subjects upon which the decisions have been in greater confusion than the application of the statute of frauds to indemnity contracts in general. The recent action of the Virginia court in *Alphin* v. *Lowman,* 79 S. E. 1029, overruling its former decision in *Wolverton* v. *Davis,* 85 Va. 64, illustrates a tendency toward uniformity at least.

Part of the confusion upon the subject seems to have resulted from the tendency of the courts to treat indemnity contracts as a distinct class always showing certain characteristics. This is probably due to a broad statement in one of the earliest cases on the subject, *Thomas* v. *Cook,* 8 Barn. & A. 728, that "a contract of indemnity does not come within the words or spirit of the statute of frauds." This statement is manifestly too broad, since for the purposes of the statute of frauds it is impossible to treat all indemnity contracts alike. The one question is whether the contract is a promise to answer for the debt of another, and in this respect indemnity contracts may differ widely. It is true that the ordinary contract of indemnity does not come within the statute for very good reasons, but as was said in *Green* v. *Creswell, infra,* almost any contract of guaranty can be so framed as to amount to a promise to indemnify.

All indemnity contracts come within one of the general principles which limit the application of the statute of frauds—that a promise made to a debtor to discharge his debt is not a promise to answer for the debt of another, since to come within the statute the promise must be made to the creditor. For this reason we can always dismiss from consideration the main obligation which the promisee has assumed. As to this he is a debtor and to the extent that the contract of indemnity is a promise to answer for this debt the statute